172

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No. 10-145

In the Supreme Court of the United States

DAVID KEATING, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the en banc court of appeals correctly held that the reporting, organizational, and administrative requirements of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, are constitutional as applied to the treasurer of a group whose major purpose is the making of independent expenditures to elect or defeat clearly identified federal candidates.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Buckley v. *American Constitutional Law Found., Inc.*, 525 U.S. 182 (1999)	11
Buckley v. *Valeo*, 424 U.S. 1 (1976)	*passim*
Citizens United v. *FEC*, 130 S. Ct. 876 (2010)	*passim*
Davis v. *FEC*, 128 S. Ct. 2759 (2008)	16, 17
Doe v. *Reed*, 130 S. Ct. 2811 (2010)	11
FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)	12, 18, 23
FEC v. *National Conservative Political Action Comm.*, 470 U.S. 480 (1985)	13
McConnell v. *FEC*, 540 U.S. 93 (2003)	7, 11, 15
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974)	24
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947)	24
Shays v. *FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007)	24
The Real Truth About Obama, Inc. v. *FEC*, 575 F.3d 342 (4th Cir. 2009), vacated on other grounds, 130 S. Ct. 2371 (2010)	24
United States v. *Harriss*, 347 U.S. 612 (1954)	16

Constitution, statutes and regulations: Page

U.S. Const.:
Amend. I 2, 6, 23
Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* 2
2 U.S.C. 431(4)(A) 2
2 U.S.C. 431(4)(B) 12
2 U.S.C. 431(8)(A)(i) 2
2 U.S.C. 431(8)(B) 20
2 U.S.C. 431(9)(A)(i) 2
2 U.S.C. 431(17) 3
2 U.S.C. 432 . . . . . 6, 8
2 U.S.C. 433 . . . . . 3, 6, 8
2 U.S.C. 433(a) 3
2 U.S.C. 433(b) 19
2 U.S.C. 433(b)(1) 19
2 U.S.C. 433(b)(3) 19
2 U.S.C. 433(b)(4) 19
2 U.S.C. 433(b)(6) 19
2 U.S.C. 434 3
2 U.S.C. 434(a) 6, 8
2 U.S.C. 434(c) 3
2 U.S.C. 434(c)(2)(A)-(C) 3, 18
2 U.S.C. 434(g) 4
2 U.S.C. 437c(c) 5
2 U.S.C. 437d(a)(7) 5
2 U.S.C. 437f 5
2 U.S.C. 437h 6

Statutes and regulations—Continued: Page

2 U.S.C. 441a(a)(2) 24
2 U.S.C. 441a(a)(4) 24
2 U.S.C. 441b 12, 13
2 U.S.C. 441b(b)(2)(C) 12
2 U.S.C. 441b(b)(4) 12
2 U.S.C. 441c(a) 15
2 U.S.C. 441d(a) 4
2 U.S.C. 441d(a)(3) 4
2 U.S.C. 441d(d)(2) 4
2 U.S.C. 441e 15
Internal Revenue Code (26 U.S.C.):
§ 527 ..... 4, 24
§ 527(i)(6) 20
28 U.S.C. 1292(a)(1) 6
11 C.F.R.:
Section 100.5(b) 12
Section 100.74 20
Section 100.94 20
Section 110.11(a)(1) 3
Section 114.1(a)(2)(iii) 12
Section 114.2(b)(2) 12
Sections 114.5-114.8 12
Section 114.12(a) 10

Miscellaneous:

Stephen D. Ansolabehere et al., *Why Is There So Little Money in American Politics?*, J. Econ. Persp., Winter 2003, at 105 21

Miscellaneous—Continued: Page

FEC Advisory Op. 2010-09, 2010 WL 3184267 (July 22, 2010) 22
FEC Advisory Op. 2010-11, 2010 WL 3184269 (July 22, 2010) 22
72 Fed. Reg. (2007):
p. 5595 24
p. 5597 24
p. 5599 24
p. 5601 25
pp. 5601-5602 24
p. 5605 25
PAC Outsourcing, LLC, News Items (Apr. 21, 2010), www.pacout.com/news_full. php?ID=39 21
SpeechNow.org, Statement of Organization (Sept. 13, 2010), http://images.nictusa.com/pdf/379/10030422379/10030422379.pdf 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 599 F.3d 686. The order of the district court making findings of fact and certifying constitutional questions to the en banc court of appeals (Pet. App. 31-53) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27-28) was entered on March 26, 2010. On June 17, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 23, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, imposes certain reporting, disclosure, and organizational requirements on entities falling within the FECA definition of the term "political committee." This case concerns whether those requirements violate the First Amendment as applied to a particular organization.

a. FECA defines the term "political committee" to include "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. 431(4)(A). The term "contribution" is defined to include "any gift * * * or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i). The term "expenditure" includes "any purchase, payment, * * * or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i).

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court adopted a limiting construction of the term "political committee." The Court concluded that the statutory definition of "political committee" raised potential overbreadth concerns and that the phrase "for the purpose of . . . influencing," used in defining the incorporated term "expenditure," was vague. *Id.* at 77, 79. The Court therefore narrowly construed the definition, so that a group will not be deemed a "political committee" under FECA unless, in addition to crossing the $1000 threshold of contributions or expenditures, the organization either is "under the control of a candidate" or has as its "major purpose * * * the nomination or

election of a candidate." *Id.* at 79. The Court explained that expenditures of "political committees," as so narrowly defined, "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Ibid.*

Once a group qualifies as a political committee, it has ten days to file a statement of organization with the Federal Election Commission (FEC or Commission). 2 U.S.C. 433(a). The political committee must thereafter file periodic reports disclosing receipts and disbursements in excess of $200 in a calendar year (and, in some instances, receipts and disbursements of lesser amounts). See 2 U.S.C. 433-434. Political committees must also identify themselves through "disclaimers" on all of their general public political advertising, on their websites, and in mass e-mails. 11 C.F.R. 110.11(a)(1).

b. Persons that are not political committees are not subject to the requirements discussed above, but they trigger different reporting requirements when they make an "independent expenditure." That term is defined as an expenditure "expressly advocating the election or defeat of a clearly identified candidate" that "is not made in concert or cooperation with or at the request or suggestion" of the candidate or the candidate's agents or a political party committee or its agents. 2 U.S.C. 431(17). A person (other than a political committee) must file a report for each quarter in which the person has made independent expenditures, if the aggregate total spent on independent expenditures exceeds $250 for the calendar year. 2 U.S.C. 434(c). Each quarterly report contains information about the independent expenditure and each person who made a contribution in excess of $200 "for the purpose of furthering an independent expenditure." 2 U.S.C. 434(c)(2)(A)-(C).

All persons, including political committees, that make independent expenditures shortly before Election Day that exceed certain thresholds must disclose information about the expenditures to the Commission within 24 or 48 hours. 2 U.S.C. 434(g). And all persons that make independent-expenditure communications through certain specified media must include in each communication a disclaimer providing information about who paid for the communication. See 2 U.S.C. 441d(a). The disclaimer must provide the name of, and contact information for, the maker of the independent expenditure and state whether the communication is authorized by any candidate or by any candidate's authorized committee. 2 U.S.C. 441d(a)(3). Radio or television independent expenditures must contain an additional oral or visual disclaimer stating that the person paying for the communication "is responsible for the content of this advertising." 2 U.S.C. 441d(d)(2).

2. SpeechNow.org is an unincorporated nonprofit association organized under District of Columbia law and registered as a "political organization" under the Internal Revenue Code, 26 U.S.C. 527. Pet. App. 34. Petitioner David Keating is the founder and one of five voting "members" of SpeechNow and serves as its president and treasurer. *Id.* at 35, 256. He administers all of the association's affairs. *Id.* at 35, 37. In particular, as treasurer, he is responsible for complying with the applicable requirements of FECA. *Id.* at 50.[1]

SpeechNow's purpose is to "expressly advocat[e] the election of candidates" who agree with, "and the defeat

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[1] The other petitioners are prospective donors to SpeechNow, and one, Edward Crane, is also a voting "member." Pet. App. 34, 38-39. SpeechNow itself is not a party to the proceedings in this Court. See Pet. ii; note 3, *infra*.

of candidates who oppose," SpeechNow's positions on the "rights to free speech and association." Pet. App. 37. SpeechNow plans to undertake its express advocacy through advertisements on television and other media. *Id.* at 42. SpeechNow's bylaws state that it will not coordinate its expenditures with candidates or political parties and that it will not make contributions to candidates or political committees. *Id.* at 36. The bylaws also provide that SpeechNow will not accept any donations from candidates, political parties, political committees, corporations, labor organizations, national banks, federal government contractors, or foreign nationals. *Id.* at 35.

3. In February 2008, the individual petitioners and SpeechNow filed a complaint alleging that various provisions of FECA governing political committees violated the First Amendment as applied to them. Pet. App. 286.[2] They filed an amended as-applied complaint in July 2008. *Id.* at 295. As relevant here, petitioner Keating contended that, although SpeechNow did not object to complying with FECA's disclaimer and reporting requirements for independent expenditures by groups other than political committees, see pp. 3-4, *supra*; Pet. 2; Pet. App. 48-49, the full disclosure and organizational requirements applicable to political committees cannot constitutionally be applied to SpeechNow. Pet. App. 22.

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[2] Before filing suit, SpeechNow sought an advisory opinion from the Commission, see 2 U.S.C. 437f, to address whether FECA requires SpeechNow to register as a political committee and to treat the donations it receives as "contributions." Pet. App. 179-221. The Commission could not issue the requested opinion at that time because it lacked a sufficient number of voting members. *Id.* at 222-223; see 2 U.S.C. 437c(c), 437d(a)(7).

Petitioners sued under a special judicial-review provision, 2 U.S.C. 437h, which permits individuals to request the en banc court of appeals to determine the constitutionality of "any provision" of FECA. Under Section 437h, the district court makes findings of fact and certifies nonfrivolous constitutional questions to the court of appeals sitting en banc.[3]

4. The district court certified five questions of law to the en banc court of appeals. Pet. App. 7-8, 33-34. Only the fourth certified question is at issue here. That question was:

> Whether the organizational, administrative, and continuous reporting requirements set forth in 2 U.S.C. §§ 432, 433, and 434(a) violate the First Amendment by requiring David Keating, SpeechNow.org's president and treasurer, to register SpeechNow.org as a political committee, to adopt the organizational structure of a political committee, and to comply with the continuous reporting requirements that apply to political committees.

Ibid. The first three certified questions, which are not at issue here, concerned petitioners' claim that FECA's

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[3] An organization like SpeechNow is not among those authorized to seek review under Section 437h, so SpeechNow was not a party to the proceedings before the en banc court of appeals on the certified questions. Pet. App. 6. In the district court, petitioners and SpeechNow also sought a preliminary injunction to prevent the Commission from enforcing against them FECA's contribution limits. *Id.* at 286-287. The district court denied preliminary injunctive relief, and petitioners and SpeechNow appealed under 28 U.S.C. 1292(a)(1). The court of appeals then consolidated the preliminary-injunction appeal with the en banc Section 437h proceedings. Pet. App. 6. Because the preliminary-injunction appeal is not at issue here, SpeechNow is not a party in this Court. Pet. ii.

limits on contributions to SpeechNow violated petitioners' First Amendment rights. *Id.* at 33.[4]

The district court also found certain facts, to which the parties substantially agreed. Pet. App. 34-53; see *id.* at 33. In particular, the court found that if SpeechNow were to accept donations in excess of $1000, SpeechNow satisfies the other criteria for political-committee status and would be required under FECA to register as a political committee. *Id.* at 49; see *id.* at 273.

5. The en banc court of appeals unanimously found "no constitutional infirmity in the application of the organizational, administrative, and reporting requirements set forth in certified question[ ] 4." Pet. App. 25. The court of appeals therefore answered that question in the negative. Separately, the court of appeals held that FECA's contribution limitations "cannot be constitutionally applied against SpeechNow and the individual [petitioners]." *Id.* at 27-28; see *id.* at 10-20. The government has not sought review of the latter holding.

In rejecting petitioners' challenge to the reporting and organizational requirements, the court of appeals contrasted disclosure requirements with regulations limiting a person's ability to spend money on political speech. "[D]isclosure requirements," the court stated, "'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" Pet. App. 20 (quoting *Buckley*, 424 U.S. at 64, and *McConnell* v. *FEC*,

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[4] The fifth certified question concerned whether Keating as treasurer could postpone complying with the registration and reporting requirements for a political committee if the court of appeals decided that those requirements could constitutionally be applied to Keating and SpeechNow. Pet. App. 8, 34. The court of appeals unanimously upheld the applicable FECA timing requirements, *id.* at 25, 28, and petitioners have not sought review of that ruling in this Court.

540 U.S. 93, 201 (2003)) (citation omitted). As a consequence, the court explained, this Court has held that disclosure requirements are subject to less stringent review than are restrictions on expenditures. To establish a disclosure requirement's validity, the government may "point to any 'sufficiently important' governmental interest that bears a 'substantial relation' to the disclosure requirement." *Id.* at 21 (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010)). The court of appeals also noted that an interest can be sufficiently important to support a disclosure requirement even if it would not support an outright restriction on speech such as an expenditure limit. *Id.* at 20-21.

Applying that standard, the court of appeals concluded that two governmental interests—in information and enforcement—are "sufficiently important * * * to justify requiring SpeechNow to organize and report to the FEC as a political committee." Pet. App. 25. First, the court explained that this Court had upheld organizational and reporting requirements—including the same requirements at issue here—on the basis of the government's interest in providing the electorate with information about the sources that fund election activity. *Id.* at 21 (discussing *Buckley*, *McConnell*, and *Citizens United*). In particular, the court of appeals noted, this Court in *Buckley* upheld "the requirements of §§ 432, 433, and 434(a) at issue here." *Ibid.*

Second, the court of appeals concluded that the required disclosures for political committees also serve the important governmental interest in "deter[ring] and help[ing to] expose violations of other campaign finance restrictions." Pet. App. 25. The court cited as an example the restrictions "barring contributions from foreign corporations or individuals." *Ibid.*

The court of appeals further explained that the applicable reporting and organizational requirements impose only a minimal burden on SpeechNow. Pet. App. 22-24. The court noted petitioners' expressed intent that SpeechNow would comply with the disclaimer and disclosure requirements that apply to individuals or groups that are not political committees. See *id.* at 22-23. The court concluded that the additional reporting requirements that would apply to SpeechNow if it became a political committee are "minimal" because SpeechNow intends only to make independent expenditures, and the attendant disclosure requirements overlap substantially with the requirements with which SpeechNow concedes it must comply. *Ibid.*; see *id.* at 24. The court further found that organizational requirements such as designating a treasurer and retaining records would not "impose much of an additional burden upon SpeechNow, especially given the relative simplicity with which SpeechNow intends to operate." *Id.* at 23.

6. On September 13, 2010, after the petition for a writ of certiorari was filed, the FEC received SpeechNow's Statement of Organization registering as a political committee and appointing Keating treasurer. See Statement of Organization, http://images.nictusa.com/pdf/379/10030422379/10030422379.pdf.

ARGUMENT

The court of appeals correctly rejected petitioners' as-applied challenge to FECA's disclosure, organizational, and administrative requirements for political committees, and its disposition of that challenge does not conflict with any decision of this Court. Petitioners do not assert that the judgment conflicts with any deci-

sion of another court of appeals. Further review therefore is not warranted.

The ruling that petitioners challenge does not restrict the amount of money that SpeechNow may raise and spend on independent communications in support of (or in opposition to) candidates for federal office. Unlike the plaintiff organization in *Citizens United* before this Court decided that case, SpeechNow may spend as much money as it can raise. And under the court of appeals' separate holding, not challenged here, SpeechNow can take in contributions from individuals in unlimited amounts. Nor, despite petitioners' repeated assertions to the contrary, see Pet. 2, 4, 11, 12, 21, 26, does the question presented concern any distinction between corporate and unincorporated entities. Rather, the question in this case is whether the Constitution precludes the application to SpeechNow of the reporting, disclosure, and organizational obligations that apply to all political committees, incorporated and unincorporated alike.[5]

1. a. The court of appeals correctly applied the standard of exacting scrutiny that this Court has used for more than 30 years in reviewing reporting and disclosure provisions. In cases from *Buckley* to *Citizens United*, this Court has distinguished disclosure, reporting, and administrative requirements from limits on expenditures. *Buckley*, 424 U.S. at 64. That constitutional distinction reflects the fact that "disclosure requirements * * * do not prevent anyone from speaking." *Citizens United*, 130 S. Ct. at 914 (internal quotation marks and citations omitted). Accordingly, the Court in

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[5] Many political committees incorporate for liability purposes. See 11 C.F.R. 114.12(a).

Buckley adopted a standard of review, "exacting scrutiny," 424 U.S. at 64, that differs from the "strict scrutiny" this Court applies to expenditure limits, see, *e.g.*, *Citizens United*, 130 S. Ct. at 898. As the Court recently explained, "'exacting scrutiny' * * * requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 914 (quoting *Buckley*, 424 U.S. at 64, 66).

Since *Buckley*, the Court has used "exacting scrutiny" as the standard for evaluating various campaign-related disclosure requirements. See, *e.g.*, *Doe* v. *Reed*, 130 S. Ct. 2811, 2818 (2010) (disclosure of signatures on referendum petitions); *McConnell*, 540 U.S. at 196; *Buckley* v. *American Constitutional Law Found., Inc.*, 525 U.S. 182, 202 (1999) (disclosure of expenditures to get referendum on ballot). Indeed, although the Court in *Buckley* focused on the interests that support disclosure of contributions to candidates, the Court did not hold that the validity of FECA's reporting and disclosure requirements depended on a group's particular spending pattern. See 424 U.S. at 60-84. Because the FECA provisions that petitioners challenge in this Court do not limit SpeechNow's ability to raise or spend funds to speak as it sees fit, but require only that SpeechNow disclose the origins and destination of those funds (and take accompanying administrative steps), the court of appeals properly applied this Court's intermediate "exacting scrutiny" standard rather than the strict scrutiny applicable to speech prohibitions.

b. Petitioners contend (Pet. 10, 21-22) that the court of appeals should have applied strict scrutiny. Petitioners' argument fails because it is based on the flawed premise (Pet. 21) that the disclosure requirements at issue in this case are analogous to the expenditure limi-

tation at issue in *Citizens United*—*i.e.*, that requiring SpeechNow to register as a political committee is equivalent to forbidding Citizens United from electioneering except through a "separate segregated fund," which is only one type of political committee among many. 2 U.S.C. 431(4)(B); 11 C.F.R. 100.5(b). Despite petitioners' repeated attempts to liken SpeechNow to the corporation at issue in *Citizens United* (*e.g.*, Pet. 2, 9-10, 15, 16, 17, 19, 20, 21-22, 25), the analogy fails. Unlike the separate segregated fund alternative (what this Court called the "PAC alternative") that this Court considered in *Citizens United*, the requirement that SpeechNow register as a political committee does not prevent the organization from engaging in campaign advocacy in its own name and with its own treasury funds.

In both *Citizens United* and *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court considered 2 U.S.C. 441b, which precluded corporations from spending their treasury funds to expressly advocate the election or defeat of a federal candidate. Although a corporation could form a separate segregated fund to finance express advocacy, the fund could not use money from the corporation for that advocacy. See 2 U.S.C. 441b(b)(2)(C); 11 C.F.R. 114.1(a)(2)(iii), 114.2(b)(2). Rather, it could raise money only from individuals having specified connections with the corporation, and then only under various rules concerning the time, manner, and frequency of solicitation. See 2 U.S.C. 441b(b)(4); 11 C.F.R. 114.5-114.8.

In *Citizens United*, this Court concluded that Section 441b was "a ban on corporate speech[,] notwithstanding the fact that a PAC created by a corporation can still speak," in part because "[a] PAC is a separate association from the corporation." 130 S. Ct. at 897; see *MCFL*,

479 U.S. at 252 (plurality opinion) ("[T]he corporation is *not* free to use its general funds for campaign advocacy purposes."). The Court also concluded that PACs were burdensome and expensive to establish and administer. *Citizens United*, 130 S. Ct. at 897-898. For those reasons, the Court treated Section 441b as "a ban on speech" warranting strict scrutiny. *Id.* at 898.

The FECA provisions at issue here impose no such prohibition. SpeechNow is not barred from speaking, nor is it required to create a separate entity to do so. Indeed, SpeechNow is not a corporation. Pet. App. 34. Accordingly, both before and after *Citizens United*, SpeechNow was free to spend unlimited amounts on independent expenditures expressly advocating the election or defeat of federal candidates, and to do so without creating a separate segregated fund. See *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 490-501 (1985). And under a different holding of the court of appeals that is not at issue here (see Pet. App. 10-20, 27-28; p. 7, *supra*), SpeechNow can receive unlimited contributions from any individual donor.

Accordingly, petitioners are incorrect in arguing (Pet. 22) that, under *Citizens United*, a requirement to register as a political committee is subject to strict scrutiny. Although the Court characterized the political-committee reporting and registration requirements as "burdensome" in the context of a corporation's creating a separate segregated fund (*i.e.*, setting up a separate entity to engage in express advocacy while the corporation itself was prohibited from doing so), this case involves no "ban on speech." Compare *Citizens United*, 130 S. Ct. at 897, 898 (bans on speech require strict scrutiny), with *id.* at 914 (even if burdensome, disclosure requirements "do not prevent anyone from speaking"

and are not reviewed under strict scrutiny) (citation omitted).

2. a. The court of appeals correctly applied this Court's precedents in recognizing two important governmental interests that support the disclosure and administrative requirements at issue here. Pet. App. 21-22, 24-25. Indeed, this Court expressly recognized both of those interests in *Buckley*.

First, the required data inform the electorate "as to where political campaign money comes from." *Buckley*, 424 U.S. at 66. Information about expenditures expressly supporting and opposing candidates helps voters "to define more of the candidates' constituencies," *id.* at 81 (upholding FECA's independent expenditure reporting requirements for individuals and groups other than political committees), and to identify "the interests to which a candidate is most likely to be responsive," *id.* at 66-67. Most recently, in *Citizens United*, the Court held that "the informational interest alone is sufficient" to sustain a requirement to disclose "who is speaking about a candidate shortly before an election." 130 S. Ct. at 915-916. And this Court applied that holding to disclosure of the funding sources of advertisements "even if" those advertisements "only pertain[ed] to a commercial transaction," *i.e.*, urged viewers to watch a candidate-related movie. *Id.* at 915. Information about the sort of express electoral advocacy in which SpeechNow plans to engage, Pet. App. 37, 44, is even more central to an informed consumer in "the political marketplace" than was the information required to be disclosed in *Citizens United*. 130 S. Ct. at 915.[6]

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[6] Indeed, disclosure of funding sources is even more important with respect to SpeechNow than for most other political committees, which

Second, the Court in *Buckley* stated that FECA's "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations." 424 U.S. at 67-68. Similarly in *McConnell*, the Court upheld mandatory disclosure requirements based on the interest in "gathering the data necessary to enforce more substantive electioneering restrictions." 540 U.S. at 196; see *id.* at 200-201 (upholding compelled disclosure of executory contracts to avoid creating "a significant loophole" in disclosure requirements); *id.* at 237 (upholding broadcast station recordkeeping provisions to "provide an independently compiled set of data for purposes of verifying candidates' compliance with the disclosure requirements and source limitations of [campaign-finance law]"). As the court of appeals correctly concluded (Pet. App. 24-25), the requirements challenged here serve the important governmental interest in deterring and exposing violations of campaign finance restrictions. For example, SpeechNow's bylaws state that the organization will not accept contributions from foreign nationals or federal government contractors. See *id.* at 35; see also 2 U.S.C. 441c(a) (prohibition of contributions by government contractors), 441e (prohibition of contributions and donations by foreign nationals). Full reporting and disclosure will help the FEC and the public monitor SpeechNow's compliance with these restrictions.

b. Petitioners do not address these important governmental interests directly. Rather, they contend that

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are limited to raising money from individuals in amounts no greater than $5000. Under the court of appeals' decision, petitioner may raise money in unlimited amounts, and one or a few individuals may now finance substantial portions of SpeechNow's operations.

these interests must be invalid because they would have supported requiring Citizens United and MCFL "to become PACs." Pet. 24. But as explained above, in neither *Citizens United* nor *MCFL* did the Court consider a requirement to register the organization itself as a political committee. Those plaintiffs did not meet the "major purpose" criterion for political-committee status, much less devote themselves *entirely* to electoral advocacy as SpeechNow does, and their spending could not be presumed to be campaign-related.

Contrary to the suggestion of petitioners (Pet. 30) and their amici (Br. 2, 25), anticorruption interests are not the only valid basis for disclosure requirements. As the court of appeals correctly recognized, "[b]ecause disclosure requirements inhibit speech less than do contribution and expenditure limits," this Court "has not limited the government's acceptable interests to anticorruption alone." Pet. App. 20-21. Thus, even though the Court in *Citizens United* invalidated FECA's ban on corporate-financed independent expenditures because it concluded that independent expenditures pose no danger of corruption, it held that the informational interest justified mandatory disclosure regarding the same expenditures. 130 S. Ct. at 908-909, 913-916. That holding was based in turn on *Buckley*, in which the Court upheld disclosure requirements while invalidating a cap on spending. *Id.* at 915 (citing *Buckley*, 424 U.S. at 75-76). Likewise, the Court had earlier upheld registration and disclosure requirements for lobbyists even though Congress cannot constitutionally ban lobbying itself. See *ibid.* (citing *United States* v. *Harriss*, 347 U.S. 612, 625 (1954)).

Petitioners' reliance (Pet. 22-23) on *Davis* v. *FEC*, 128 S. Ct. 2759 (2008), is misplaced. In *Davis*, this Court

struck down a set of asymmetrical contribution limits, under which a federal candidate's decision to spend large amounts of personal funds on his own campaign triggered increased limits on contributions to his opponents. See *id.* at 2770-2774. The Court then concluded that, because the accompanying disclosure requirements "were designed to implement the asymmetrical contribution limits" that the Court had invalidated, those requirements "cannot be justified" by any legitimate governmental interest. *Id.* at 2775. Unlike in *Davis*, the disclosure requirements at issue here promote the enforcement of valid substantive provisions of campaign finance law, as the court of appeals correctly recognized. Pet. App. 21-22, 24-25; see p. 15, *supra*. And as *Citizens United* confirms, an informational interest may justify requiring disclosure of the funding for independent expenditures even when the expenditures themselves may not be limited. See 130 S. Ct. at 915.

c. The court of appeals correctly concluded that the government's important informational and enforcement interests extend to the full range of information that SpeechNow will be required to disclose if it becomes a political committee. That disclosure includes information about contributions toward SpeechNow's administrative expenses. As the court of appeals stated (Pet. App. 24), "the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures."

In *MCFL*, the Court struck down political-committee reporting and registration requirements for certain issue-oriented organizations that only "occasionally make independent expenditures," *i.e.*, those "whose ma-

jor purpose is not campaign advocacy." 479 U.S. at 252-253, 263. Such groups need only identify each person who contributed more than $200 "for the purpose of furthering an independent expenditure." 2 U.S.C. 434(c)(2)(A)-(C); see p. 3, *supra*. The Court explained, however, that if MCFL's independent campaign spending became its major purpose, MCFL would have to abide by the rules applicable to entities whose "primary objective is to influence political campaigns," that is, political committees. 479 U.S. at 262. Those rules include the organizing, reporting, and administrative obligations that petitioners challenge here.

4. Petitioners also contend (Pet. 4-5, 15-16) that, in the circumstances of this as-applied challenge, the additional reporting and administrative obligations applicable to political committees impose an unconstitutionally excessive burden on SpeechNow. The court of appeals correctly rejected that claim, and its holding—which is specific to organizations that have adopted the particular set of self-imposed restrictions that SpeechNow follows, see Pet. App. 35-36—does not warrant further review.

a. Petitioner Keating is a veteran political activist who leads the flourishing Club for Growth PAC, has worked for other PACs, and put in place the systems for those entities to ensure that their required reports were filed properly with the Commission. FEC Exh. 11, 08-CV-248 Docket entry No. 45-1, at 3-4, 6, 8-9. Keating has stated that he is "sure" that he "can handle" the duties of a treasurer, and that he "[g]enerally" understands the reporting requirements of nonconnected political committees. *Id.* at 46; FEC Exh. 103, 08-CV-248 Docket entry No. 45-8, at 3. Thus, Keating is demonstrably capable of complying with the organizational and

reporting requirements for SpeechNow. His wish to devote more of his "spare time" (Pet. 4) to other activities does not differentiate him from any other person who has obligations under FECA, much less convert a constitutionally permissible obligation into an unconstitutional one.

b. As the court of appeals concluded, the organizational requirements that petitioners challenge, such as designating a treasurer and retaining records, do not "impose much of an additional burden upon SpeechNow, especially given the relative simplicity with which SpeechNow intends to operate." Pet. App. 23. Keating is already the treasurer of SpeechNow and has direct knowledge of the group's finances and activities. See *id.* at 37-38. The Statement of Organization for SpeechNow, see 2 U.S.C. 433(b), required Keating to furnish such basic information as "the name, address, and type of committee" (here, a nonconnected committee); "the name, address, and position of the custodian of books and accounts of the committee" (Keating); "the name and address of the treasurer of the committee" (Keating); and "a listing of all banks, safety deposit boxes, or other depositories used by the committee." 2 U.S.C. 433(b)(1), (3), (4) and (6). Keating recently filed the Statement of Organization registering SpeechNow as a political committee, see p. 9, *supra*, which further confirms the absence of any reason to suppose that supplying this information will be unduly burdensome.

c. The court of appeals also correctly concluded that, "[b]ecause SpeechNow intends only to make independent expenditures, the additional reporting requirements that the FEC would impose on SpeechNow if it

were a political committee are minimal." Pet. App. 23.[7] The independent-expenditure disclosures by SpeechNow would include some of the same information that political committees must report. See *id.* at 22-23. And because SpeechNow is not a political party committee and intends to engage in limited activities, Keating would not have to fill out the majority of the schedules about which petitioners complain (Pet. 4-5).[8]

d. Petitioners suggest that the cost of complying with the requirements for political committees is sufficiently high to chill election-related speech. Pet. 28. Although petitioners brought an as-applied challenge, they offered no evidence that SpeechNow will be unable to afford to take the steps necessary to comply with the challenged FECA requirements. See Pet. App. 23-24 (noting that SpeechNow already expected over $120,000 in planned contributions).[9] Instead, they cite

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[7] Because SpeechNow was, until recently, registered as a Section 527 organization under the Internal Revenue Code (Pet. App. 34), Keating was already required to keep detailed financial records and file periodic financial reports to comply with IRS requirements. See Pet. 6 (acknowledging that SpeechNow "must * * * report certain information to the IRS"). Because SpeechNow is now registered with the FEC as a political committee, Keating is no longer required to file periodic financial reports with the IRS. See 26 U.S.C. 527(i)(6).

[8] For instance, petitioners are incorrect in arguing (Pet. 4-5) that Keating will have to disclose the fair market value of the portion of his home used for SpeechNow's purposes. Keating volunteers his services to SpeechNow without pay (Pet. App. 272), and he does not thereby make a reportable contribution. See 2 U.S.C. 431(8)(B); 11 C.F.R. 100.74; see also 11 C.F.R. 100.94 (engaging in Internet activities and using computers, software, and other equipment at home not considered contributions).

[9] Petitioners plan initially to contribute a total of $121,700 to SpeechNow and, as of August 2008, had identified 75 other individuals

a political-science article as support for the proposition that "PACs spend approximately half of their total revenues on compliance costs and fundraising." Pet. 28 (citing Stephen D. Ansolabehere et al., *Why Is There So Little Money in American Politics?*, J. Econ. Persp., Winter 2003, at 105, 108 (Ansolabehere)). That is an inaccurate characterization of the cited article, which simply refers to "fundraising and other expenses" without indicating what percentage is attributable to fundraising or breaking down "other expenses" into categories. Ansolabehere 108. The article thus provides no figures for compliance costs as distinguished from, for example, rent or candidate research costs. A recent survey of the political-committees of leading *Fortune* 100 companies shows that reporting and compliance responsibilities in fact account for only 15% of political-committee staff time on average, and that roughly 80% of the political committees surveyed have two or fewer employees. See PAC Outsourcing, LLC, News Items (Apr. 21, 2010), www.pacout.com/news_full. php?ID=39.

5. Finally, petitioners (Pet. 29-39) and their amici (Br. 25-28) contend that the "major purpose" test for political-committee status should be clarified or abandoned. That contention is not properly presented in this case. In the proceedings below, petitioners did not dispute that SpeechNow would qualify as a political committee under the existing "major purpose" test once it

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who have indicated that they wish to contribute. See Pet. App. 24, 38-39, 41; see also *id.* at 23-24 (en banc court rejected SpeechNow's contention that it cannot comply with the reporting requirements until it knows if it will have enough money to spend, explaining that "[t]his is a specious interpretation of the facts" since SpeechNow already had more than $120,000 in planned contributions from petitioners and dozens more individuals waiting to donate).

met the $1000 contribution threshold. The court of appeals accordingly did not address the question.[10]

In any event, petitioners identify no sound reason for this Court now to reconsider the "major purpose" element of the statutory definition that the Court adopted in *Buckley*, see 424 U.S. at 79, and that the FEC, the lower courts, and regulated parties have relied upon for more than three decades. Petitioners criticize the test for "replac[ing] the strict scrutiny" standard (Pet. 36), but the "major purpose" test is not a standard of review. Instead, it is a constitutionally based narrowing construction of the FECA definition of "political committee."

Petitioners also contend that a group's major purpose to support or oppose a candidate is a necessary, but not a sufficient condition under the Constitution for the group's becoming a political committee. Pet. 31, 34. But this Court in *Buckley* nowhere suggested that any additional condition, beyond the one the Court itself eluci-

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[10] Petitioners cite (Pet. 28 n.6) two FEC advisory opinions as support for their claim that the court of appeals' opinion has caused confusion that this Court should now "clarify." But as noted above, that decision did not discuss, much less alter, the criteria for determining an organization's "major purpose." In any event, the entities that requested those advisory opinions did not question, as petitioners do, whether FECA's political-committee organizational, reporting, and disclosure requirements would apply to them. Rather, the requesters primarily inquired whether they may solicit and accept unlimited contributions, as SpeechNow now can, in light of the court of appeals' holding in this case concerning the application of FECA's contribution limits. See p. 7, *supra*. Indeed, both advisory-opinion requests stated that the entities in question would file regular reports in compliance with the requirements for political committees. FEC Advisory Op. 2010-11, 2010 WL 3184269 (July 22, 2010); FEC Advisory Op. 2010-09, 2010 WL 3184267 (July 22, 2010).

dated, would be needed to make the statutory definition of "political committee" constitutional. In particular, contrary to petitioners' assertion (Pet. 30), the Court did not hold that posing "a threat of corruption" rather than having the major purpose of electoral advocacy is the "constitutional touchstone" for determining whether a group is a political committee. See 424 U.S. at 79-81; pp. 14-15, *supra* (explaining this Court's repeated holdings that important interests other than the anticorruption interest may justify disclosure requirements).

Petitioners also offer an interpretation of the "major purpose" test that no court has endorsed and that petitioners did not urge below. Noting this Court's references to groups "under the control of *a* candidate" or whose major purpose is "the nomination or election of *a* candidate," *Buckley*, 424 U.S. at 79 (emphases added), petitioners suggest (Pet. 33) that the term "political committee" is limited to groups dedicated to the election or defeat of a single specific candidate, and does not encompass groups that support or oppose a larger class of candidates. The Court introduced the "major purpose" test, however, not to exclude from "political committee" status groups that support or oppose multiple federal candidates, but to protect the First Amendment rights of "groups engaged purely in issue discussion." 424 U.S. at 79.

In *MCFL*, the Court considered a newsletter that advocated the election of a number of candidates. 479 U.S. at 243-244. The Court stated that, if MCFL's "campaign activity" became the organization's major purpose, MCFL would "automatically" be treated as a political committee. *Id.* at 262. That analysis indicates that an exclusive organizational focus on a single candidate is not a prerequisite to "political committee" status.

Petitioners' interpretation also cannot be reconciled with FECA's recognition of multicandidate political committees, see 2 U.S.C. 441a(a)(2) and (4); indeed, under petitioners' theory, the term "multicandidate political committee" would be an oxymoron.

Petitioners also object (Pet. 37-38) to the manner in which the FEC makes major-purpose determinations. When confronted with rulemaking petitions asking that the Commission classify nearly all Section 527 organizations as political committees, the Commission decided, as a matter of discretion, to implement the "major purpose" test on a case-by-case basis instead of by rulemaking. See Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595 (2007); see also, *e.g.*, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual * * * litigation is one that lies primarily in the informed discretion of the administrative agency."); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-295 (1974). The Commission's decision was upheld in *Shays* v. *FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007); accord *The Real Truth About Obama, Inc.* v. *FEC*, 575 F.3d 342, 350-351 (4th Cir. 2009) (refusing to preliminarily enjoin, *inter alia*, the FEC's case-by-case approach to the "major purpose" test), vacated on other grounds, 130 S. Ct. 2371 (2010). The Commission had explained that no general rule would produce the correct result in all cases, but that a case-by-case approach provided the flexibility necessary to take into account the individual characteristics of a group. *Shays*, 511 F. Supp. 2d at 30; 72 Fed. Reg. at 5597, 5599, 5601-5602.

Petitioners do not identify any administrative decision in which they believe that the FEC misidentified a particular group's "major purpose." And, contrary to

the contentions of petitioners and their amici, the FEC can discern a group's "major purpose" without conducting "a profoundly burdensome inquiry into every aspect of a group's activities." Pet. 35; see Committee for Truth in Politics Amicus Br. 26-27. Sources such as the group's public statements, fundraising appeals, disclosure reports, charters, or bylaws usually provide the relevant facts. See 72 Fed. Reg. at 5601, 5605 (describing sources the Commission considers in its "major purpose" analysis). In any event, because making independent expenditures appears to be SpeechNow's *sole* purpose, whatever difficulties of administration the "major purpose" test might cause in its application to other organizations (see Pet. 37-38) are not present here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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